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In the Supreme Court of the United States

No. 76-973

STATE OF ARIZONA, et al.,

Petitioners,

v.

COOK PAINT AND VARNISH COMPANY, et al.,

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

	Page
Questions Presented	1
Statement of the Case	2
Discussion	5
A. As Respects the So-called Sherman Act Count	5
B. State Law Claims	8
Conclusion	10

INDEX OF AUTHORITIES

CASES

	Pages
Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6 Cir. 1963), *cert. denied,* 375 U.S. 922	5
Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)	6
B & B Oil & Chemical Co. v. Franklin Oil Corp., 293 F.Supp. 1313 (E.D. Mich. 1968)	5
Checker Motors Corp. v. Chrysler Corp., 283 F.Supp. 876, 882 (S.D.N.Y. 1968) aff'd., 405 F.2d 319 (2 Cir. 1969)	8
Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137 (9 Cir. 1974), *cert. denied,* 419 U.S. 1023	8
Craig v. Sun Oil Co., 515 F.2d 221 (10 Cir. 1975)	5
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	6
Fasulo v. United States, 272 U.S. 620 (1926)	8
George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1 Cir. 1974) *cert. denied,* 421 U.S. 1004 (1975)	5
Hunt v. Crumboch, 325 U.S. 821 (1945)	7
In re Multidistrict Vehicle Air Pollution, 367 F.Supp. 1298 (C.D. Cal. 1973), aff'd., 538 F.2d 231 (9 Cir. 1976)	6
Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers Ass'n., 380 F.Supp. 1382, 1388, fn. 8 (D. Conn. 1974)	6

	Pages
Norville v. Globe Oil & Refining Co., 303 F.2d 281 (7 Cir. 1962)	5
Oscanyan v. Arms Co., 103 U.S. 261 (1881)	4
Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7 Cir. 1961), *cert. denied,* 368 U.S. 944	5
Searer v. West Michigan Telecasters, 381 F.Supp. 634 (W.D. Mich. 1974) aff'd., 524 F.2d 1406 (6 Cir. 1975)	6
Sun Valley Disposal Co., Inc. v. Silver State Disposal Co., et al., 420 F.2d 341, 343 (9th Cir. 1969)	5
Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co., 392 F.Supp. 1098 (S.D. Tex. 1975)	6
W. T. Grant Co. v. Christensen, 1975 Trade Cas. ¶ 60,324 (S.D.N.Y. May 1975), aff'd., 531 F.2d 671 (2 Cir. 1976)	6

OTHER AUTHORITIES

	Pages
Sherman Act (15 U.S.C. §§ 1, et seq.)	1, 2, 3, 4, 5, 6, 7
IX Wigmore on Evidence (3rd ed.) Tit. II, Judicial Admissions	4

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QUESTIONS PRESENTED

The questions presented are not those proffered by the petition (at pp. 2, 3) but are these:

1. Does the common-law tort of misrepresentation of the nature and quality of a type of product become actionable under the Sherman Act by alleging a conspiracy to commit the misrepresentation?

2. Is the scope of a manufacturer's liability for injury from a product, under state common-law theories of strict liability or negligence, a question deserving review by this Court under its certiorari jurisdiction?

STATEMENT OF THE CASE

Each plaintiff claimed to own a structure in which polyurethane foam insulation for interior use against heat and cold had been installed from materials manufactured by one of the defendants. One count of plaintiffs' complaint charged that each defendant had made fraudulent representations concerning the flammability characteristics of the product. That is what the case was about. But in order to escape an adverse ruling about permission to prosecute the misrepresentation claim as a class action, plaintiffs voluntarily dismissed that count without prejudice.

That left three other counts, which dressed up the same basic grievance in other garb. In one of the three, the grievance was presented as a claim of strict liability of a manufacturer; in another count as one of negligence in manufacture. Another count sought to glue together the diverse claims of diverse plaintiffs against diverse defendants into one massive suit on behalf of all industrial, commercial, agricultural and governmental entities in the United States who have had the insulation installed, by alleging a conspiracy to misrepresent the flammability characteristics of the product, upon the supposition that the Sherman Act is implicated by alleging a conspiracy to commit the tort. Tucked away in the interstices of this count were brief boiler-plate phrases that defendants had "conspired to fix prices". But doubting that plaintiffs "really, in good faith, intend to pursue such a claim", defendants suggested that "full pretrial hearings and determinations" would be fruitful to get to the truth of the matter, pursuant to pretrial procedures established by local rule for ascertaining the real nature of claims asserted. At the subsequent extensive pretrial hearing, plaintiffs' several counsel variously phrased and rephrased their contention about what the antitrust claim was. The court stated its view that a claim of

> ". . . a conspiracy whereby the defendants got together and agreed to establish artificial prices for the sale of the product in question and, as part of the means to establish those artificial prices, misrepresented the flammability of that product, exchanged price information and engaged in a myriad of other unlawful activities in violation of Section 1 of the Sherman Act"

stated a claim under § 1 of the Sherman Act, but that a claim of

> ". . . a conspiracy on the part of the defendants to misrepresent the flammable qualities of the product and that misrepresentation has the effect of permitting the product to be sold at prices higher than it otherwise would be sold"

did not (Tr. 249). Pressing plaintiffs to state which claim, if either, they asserted, the court exclaimed that it had "a great deal of difficulty finding exactly where the plaintiffs stand" and that plaintiffs seemed to be playing Fox and Hounds in describing their claim (Tr. 250, 253-254).

Plaintiffs' counsel conceded that the claim as variously described by them in the colloquies was so different from the allegations in the complaint that they ought to file a redefinition and that the best way to do so was "a pretrial order *** to be entered by the Court perhaps after we submit our ideas in writing as to what it ought to contain" (Tr. 281). The court so ordered. Three months later plaintiffs' counsel wrote to the court explaining their delay in complying with the order by stating (R. 331):

> ". . . I realized that I had accepted a description of our Sherman Act claim which, upon further review with my colleagues of the presently available evidence, I believe cannot be proven. The description to which I refer is 'a conspiracy whereby the defendants got together and agreed to establish artificial prices for the sale of the product in question and, as part of the means to establish those artificial prices, misrepresented the flammability of that product, exchanged price information and engaged in a myriad of other unlawful activities in violation of Section 1 of the Sherman Act'.

> "While it would obviously have been relatively simple to use this statement of the nature of the conspiracy as the nucleus of a proposed pretrial order we have concluded that it would be a disservice to the Court and counsel to do so in the face of what appears to be a paucity of hard evidence to support the claim in that form. In consequence, we have decided to 'bite the bullet' and restate our Sherman Act claim in a manner consistent with our understanding of the evidence."

To this end the letter enclosed a proposed pretrial order (R. 391), which restated the claim in the form of radical amendment of the crucial paragraphs of the original complaint. In the original complaint plaintiffs had alleged that one of the things defendants had agreed or conspired to do was "fixing uniform, arbitrary and non-competitive price levels at which the product is sold", and there were other references to a conspiracy to "fix prices" and to meetings to exchange prices (R. 15, 16, 17). The redefinition abandoned all these price-fixing allegations. The description of the claim was now confined to an agreement or conspiracy to do a number of items, all of which were to misrepresent or conceal flammability characteristics of the product. One of the allegations of the original complaint had been that defendants conspired to misrepresent the flammability characteristics "all for the purpose of restraining trade, increasing the price of the product to users and creating an artificial market for the product." (R. 15). In the redefinition, this was recast so that increasing and fixing prices was no longer alleged to be a purpose.

Defendants thereupon moved to dismiss the so-called antitrust count, as not one of a wrong actionable under the Sherman Act, and based the motion "upon the whole record", i.e., not merely upon the amended pleading but on all the "judicial admissions" (IX Wigmore on Evidence (3rd ed.) Tit. II, Judicial Admissions; *Oscanyan v. Arms Co.*, 103 U.S. 261 (1881)). The motion was granted.

The state law counts were also ordered dismissed as alleging no claim for relief under applicable state law. From the judgment plaintiffs appealed, the court below affirmed, and the petition followed.

DISCUSSION

A. As Respects the So-Called Sherman Act Count.

The petition dwells on the elementary citations about price fixing, but this is not a price-fixing case. The question was whether plaintiffs can use the machinery of federal law and federal courts to recover treble damages for a common-law fraud, and whether the use of conventional antitrust language can convert what is basically fraud in business transactions into antitrust. And bearing in mind that, if conduct is civilly actionable under the Sherman Act, it is also a crime, the question is whether the actionable state law tort of misrepresentation becomes a federal crime because committed by conspiracy whose only purpose is to misrepresent.

"A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case." *Sun Valley Disposal Co., Inc., v. Silver State Disposal Co., et al.*, 420 F.2d 341, 343 (9 Cir. 1969). Numerous decisions have said the same thing in similar words, about fraud, misrepresentations, acts of unfair competition, and a variety of business torts. In various ways they have said that the antitrust law is not a panacea for all ills that befall citizens because damage is caused by business. For example: *Craig v. Sun Oil Co.*, 515 F.2d 221 (10 Cir. 1975); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6 Cir. 1963), *cert. denied*, 375 U.S. 922; *Norville v. Globe Oil & Refining Co.*, 303 F.2d 281 (7 Cir. 1962); *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794 (7 Cir. 1961), *cert. denied*, 368 U.S. 944; *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1 Cir. 1974) *cert. denied*, 421 U.S. 1004 (1975), *B & B Oil & Chemical Co. v. Franklin Oil Corp.*, 293

F.Supp. 1313 (E.D.Mich. 1968); *Searer v. West Michigan Telecasters,* 381 F.Supp. 634 (W.D.Mich. 1974), aff'd. 524 F.2d 1406 (6 Cir. 1975); *W. T. Grant Co. v. Christensen,* 1975 Trade Cas. ¶ 60,324 (S.D.N.Y. May 1975), aff'd. 531 F.2d 671 (2 Cir. 1976); *Kemp Pontiac-Cadillac Inc. v. Hartford Automobile Dealers Ass'n.,* 380 F.Supp. 1382, 1388, fn. 8 (D.Conn. 1974); *Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co.,* 392 F.Supp. 1098 (S.D.Tex. 1975); *In re Multidistrict Vehicle Air Pollution,* 367 F.Supp. 1298 (C.D. Cal. 1973), aff'd. 538 F.2d 231 (9 Cir. 1976)

The means by which petitioners try to convert an alleged conspiracy to defraud by misrepresentations into a price-fixing conspiracy is to argue that but for the misrepresentation consumers would either not buy the product at all or would pay less for it; ergo, price is affected upward from zero or from a lower to a higher price. Outside of a Communist country—possibly even there—anything in any economic situation sooner or later is reflected in price; imagination can therefore always find "price" somewhere in an analysis. Thus every successful strike for higher wages affects costs and by "cost-push" inflation affects prices. But *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940) taught that these things are not the effect on price with which the antitrust laws concern themselves. Both *Apex* and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) made clear that what the Sherman Act denounces is not conspiracy or conspiracy having "a commercial impact," but only a particular kind of conspiracy, one in "restraint of trade". *Noerr* stated that insofar as the Sherman Act proscribes "unethical" business conduct, it is only a condemnation of "trade restraints" (pp. 140, 141).

Antecedent in any antitrust analysis to any other question, such as whether a "restraint" is illegal *per se,* is the basic one whether the activity challenged is a "restraint of trade" at all. The words "restraint of trade" are not the equivalent of impediments to or

distortions of trade. They are words of art, whose meaning is derived from history and is confined to that historical meaning. At common law, "restraints" were but one of a variety of condemned conduct, and misrepresentations and fraud in the sale of goods were quite another traditional heading of common law. State law has always been fully capable of protecting against them and has long denounced them. Fraud and misrepresentation were known at common law, were not thought of as restraints of trade, and are no more a basis for a Sherman Act case when applied to a new product, polyurethane, than when applied to a horse trader.* In *Hunt v. Crumboch,* 325 U.S. 821, 826 (1945), this Court said:

> "That Act [Sherman] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. 'The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.' *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 513. Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law is not our concern."

A basic vice in petitioners' argument is that it is oblivious to the elementary difference between *restraining* and *inducing.* Webster defines "restrain" as "to hold back, to check, either by physical or moral force or by an interposing obstacle, to suppress, or to curb." "Induce" is defined as "to lead on, to influence, to prevail on, to move by persuasion or influence". The distinction is the same fundamental difference as exists between "fraud" and "coercion". Upon exactly this fundamental distinction the federal

*David Harum is the traditional figure of a horsetrader in the United States. But it is impossible to imagine an indictment in 1892 under the Sherman Act against David Harum and other horsetraders in upstate New York for conspiracy to misrepresent the quality of their horses.

mail fraud statute does not reach the use of the mails to coerce. *Fasulo v. United States,* 272 U.S. 620 (1926). The distinction runs throughout the law. Coercion, restraint, overpower the will, deny or foreclose to one what he wishes, while fraud leads one to will what the fraud-feasor desires. "Restraint" means conduct that deprives or is intended to deprive those in the target area of the power of choice because the "crux of any price-fixing agreement is the relinquishment by a trader * * * of the freedom to set prices in accordance with his own judgment", *Chisholm Bros. Farm Equipment Co. v. International Harvester Co.,* 498 F.2d 1137, 1142 (9 Cir. 1974), cert. denied, 419 U.S. 1023. To the same effect, *Checker Motors Corp. v. Chrysler Corp.,* 283 F.Supp. 876, 882 (S.D.N.Y. 1968), aff'd., 405 F.2d 319 (2 Cir. 1969). "Fraud" is a different species of wrongdoing; it does not deprive one of choice; it induces choice.

The petition also contends that defendants conspired not to compete against each other in representations as to relative freedom from flammability hazards, but that contention was first made in a reply brief in the Court of Appeals. There was never a claim in the complaint or in the district court that the polyurethanes of the several defendants were different, or that some were less fire hazardous than others. They were all charged as a fungible chemical, and it was polyurethane against the world, not a situation of intra-defendant variability.

B. The State Law Claims.

The issue here is what kind of claims are redressable under doctrines of strict liability and negligence. That issue is a question of state law, here the laws of California, Arizona, Hawaii and Alaska. The district judge and the three judges of the panel of the Court of Appeals, residents of the area and trained in its laws, have construed the applicable state law as not reaching the kind of injuries claimed by plaintiffs. Whether these four judges, familiar with the common-law of these states, are right

or wrong is not the kind of question to which this Court should apportion any of its limited time.

Plaintiffs try to insinuate some kind of federal question into this state law subject by constructing a procedural question of pleading. The gist of this argument is that state law permits recovery for "physical harm", that the complaint as amended contained the label "physical harm", and that therefore the district court ignored the pleading. But what the district court did was to hold that *the type of injury asserted,* by whatever conclusory words it was labeled, was not a type redressable under applicable state law. The court reached its decision only after an extensive discussion in open court, wherein plaintiffs' counsel had said to the court:

> "I want to tell you what our case is about so we can make the magic words in the complaint match what I am saying"

to which the court responded:

> "THE COURT: Well, the question we have before us we shouldn't think of as magic words of the complaint, what we are trying to find out is the actual nature of the injury of which you complain. ***
>
> All right. Now, what is the injury to [sic] damage here that you claim?" (Tr. pp. 97, 98).

After explaining in full the alleged injuries, plaintiffs asked leave to amend the complaint to label the injuries as "physical harm", and the court responded:

> "THE COURT: I wouldn't have any objection to that, if you would like to do that. What we are really talking about in that count was the argument and the theory which you so eloquently advanced yesterday. *** But I really feel the legal question has been squarely put before me." (Tr. 265-266)

It then decided the state law question, going to the substance. The sole issue is the scope of state law, not niceties of pleading.

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, February 8, 1977.

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